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TRADE-BASED CONSTITUTIONALISMS: THE FRAMEWORK FOR UNIVERSALIZING SUBSTANTIVE INTERNATIONAL LAW?

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I. INTRODUCTION: CONSTRUCTING¹ UNIVERSALITY IN THE FACE OF DIFFERENCE

Over the last thirty years, international law has sought to do more than simply facilitate the peaceful coexistence of states. It has aimed to implement international social and political cooperation through international substantive law (e.g., environmental law and human rights). While the coexistence program sought simply to draw lines between nations and maintain peace (external), the cooperation program has striven to harmonize the social and political structures of states (internal).²

1. This term is used to emphasize the view of the writer that law is a process of construction, not simply a given. See James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-House of Language*, 26 HARV. INT'L L.J. 327 (1985); Outi K. Korhonen, *New International Law: Silence Defence or Deliverance?*, 7 EUR. J. INT'L L. 1 (1996).

2. The development of substantive international law has urged academic consideration of the possibility of world governance and universality of substantive laws. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS*, xxix-xxxi (3d ed. 1993); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* [hereinafter CSIL] (1964); Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSLETTER 1 March-May 1993. More recently, the "law amongst liberal nations" school has given added dimension to the notion of universal liberal norms of cooperation and coexistence. Anne-Marie Slaughter, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the UN*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1994); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 1 (1995). However, the points of reconciliation for nations with differing viewpoints as to the content of substantive international law remain vague. Little has been written about "constructing universal substantive norms of international law in the face of difference." See OSCAR SCHACTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE: GENERAL COURSE IN PUBLIC INTERNATIONAL LAW*, ch. XV (1985), where Schacter talks of managing the antinomies (differences) inherent in the internationalization of human rights. There is a mountain of writing on cultural relativism and human rights. E.g., in the context of the rights of children, see Philip Alston, *The Best Interests Principle Towards A Reconciliation Of Culture And Human Rights*, 8 INT'L J.L. & FAM. 1 (1994). In the context of feminist

My aim is first to outline the movement to, and different nature of, the cooperation program and then to analyze the process for achieving the harmonization or universalization inherent in cooperation. When the objective of international law was merely one of coexistence, universality of the structural/external rules of international law was less problematic. However, once the program changed to include cooperation, the internal fabric of the state came into question and the establishment of universal norms (i.e., norms which all nations support) became less certain in the face of cultural, ideological, economic, and religious differences. The primary aim of this article is to establish how universal norms of substantive international law are being, and will be, constructed. My suggestion is that the universalizing framework has moved or is moving from traditional public international law fora to the international trade regime.³ I wish to examine the reasons for this

theory, see Nancy Kim, *Towards a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49 (1993). However, these writings tend to take an "all or nothing" approach, while ignoring the significance of managing difference.

3. Since the 1950s, we have witnessed the introduction and rapid development of trade-motivated international and transnational agreements (e.g. GATT and EEC, respectively). In the 1990s, these trade-based agreements have matured into much more than simple trade agreements. They now represent "constitutional systems" which impact heavily upon social and political affairs. My usage of the word "constitutionalism" in this situation may be problematic for some, so let me explain what I mean.

Outside of domestic constitutionalisms, we have seen the rise of a transnational constitutionalism in Europe. European law scholars tend to suggest that a constitutionalism is something that affects the rights of individuals directly, or that allows individuals to enforce rights. See Eric Stein, *Judges, Lawyers and The Making of a Transnational Constitution*, 75 Am. J. Int'l L. 1 (1981); Jan Tumliar, *GATT Rules and Community Law - A Comparison of Economics and Legal Functions*, 4 STUDIES IN TRANSNATIONAL ECONOMIC LAW 1, 10 (1986); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2409 (1991). But in its broadest sense, a constitutional system is something that distributes, governs, and regulates power. See generally, MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Colin Gordon et al., trans. & Colin Gordon ed., Harvester Press 1980). No matter who can enforce it, ultimately it is the individual that bears the effects of that distribution of power. Professor John Jackson sees the domestic and

shift and the effects thereof. In this regard, I will focus on the new World Trade Organization/General Agreement on Tariffs and Trade [hereinafter WTO/GATT] charter and its appendage of substantive norms of intellectual property to the trade regime.

II. THE SPACES OF INTERNATIONAL LAW: SOURCES, PROCESS, AND SUBSTANCE

As this is an article about one specific area of international law, namely substantive international law, it is necessary at the outset to introduce a framework for understanding the different spaces of international law. The most developed framework is the "representational framework" espoused by David Kennedy.

In teaching and writing about international law, David Kennedy employs a framework of analysis—mirroring/parodying the prevailing casebook "representation" of public international law—which moves through a chronological progress narrative⁴ of

international law relating to trade making up the "trade constitution," which acts to "impose different levels of restraint on the policy options available to public or private leaders." JOHN H. JACKSON, *WORLD TRADING SYSTEM* 299 (1989). With the advent of a compulsory and enforceable dispute resolution system, which can impact through retaliation directly on the lives of private citizens, and with the addition of important substantive norms to GATT, it seems certain that many scholars would follow Jackson in calling this a constitutional system, more so than public international law which lacks a compulsory judicial enforcement procedure. It seems arrogant to deny the trade regime the status of a constitutional system. It is in categorizing it as such that we may better understand how individuals intersect with it. Constitutionalism might better be seen as layered rather than unitary; we have and interact with many constitutionalisms in our daily life. It is not simply a question of which constitutionalism is supreme, but rather how existing constitutionalisms impact upon us. This is why the availability of a compulsory and coercive judicial review or enforcement mechanism is so important in assessing the strengths of constitutionalisms.

4. A progress narrative that is forever locked in a battle between sovereign autonomy (The Case of The SS Lotus (France v. Turkey), P.C.I.J., 2 Hudson World Court Report No. 20; restrictions on the independence of States cannot be presumed) and sovereign community (*erga omnes*, human rights). See also Brian F. Fitzgerald, Portugal v. Australia: Deploying the Missiles of Sovereign Autonomy and Sovereign Community, 37 HARV. INT'L L.J. 260 (1996); MARTTI

sources, process, and substance.⁵ While bits and pieces of this framework are suggested by the current tradition of international legal jurisprudence and prevailing casebooks, the genius of Kennedy's work is to draw out a coherent framework of analysis which explains the representations of the current tradition.

A. *The Move From Process (Coexistence) to Substance (Cooperation)*

Kennedy's framework is particularly relevant to this essay in explaining the move from process to substance, from international norms of coexistence to norms of cooperation. In Kennedy's framework, the realm of process governs issues such as statehood, recognition, responsibility, jurisdiction, and international institutions;⁶ the so termed "international plane." In Kennedy's framework, the one true point of universality;⁷ the construction of

KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989). The tension is clear in the move from process to substance. As international law seeks to regulate more and more of the internal structure of states, the cry of sovereign autonomy is heard. This is where universality enters the picture.

5. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 8 (1986); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1, 30-36 (1988) [hereinafter *New Stream*]; Phillip Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811 (1990).

6. Kennedy, *New Stream*, *supra* note 5, at 33.

7. Universality has always been an awkward question for the progress narrative. In the beginning, it ignored the primitive. *See* H. Wheaton, *Elements of International Law* 44-47 (1936); ANTHONY ANGHIE, *CREATING THE NATION STATE: COLONIALISM AND THE MAKING OF INTERNATIONAL LAW* 62 (SJD Dissertation Harvard Law School, 1995) (citing Montesquieu - "every nation has a law of nations--even the Iroquois who eat their prisoners, have one"; Judge Gray's use of the word "civilized" in *The Paquete Habana*, 175 U.S. 677 (1900)). *Cf.* Vitoria, who presented a theory of a universal international law; Chief Justice Marshall in *The Antelope*, 23 U.S. (Wheaton 10) 66 (1825). Then embraced all in the mode of coexistence, in pursuit of colonization. Finally, Friedmann, in a lust for international law, grabbed for substance where universality was not possible, suggesting a segmented universality which would open the door to at least "some" form of sovereign community.

a platform upon which states can coexist.⁸ However, the move towards substance asks that the platform be raised, and it is at this point that difference threatens to destroy universality.⁹

As Kennedy's rehearsal of the progress narrative of the prevailing casebook "representation" depicts, the raising of the platform began in the early 1960's when international law expanded from a role of mere coordination (coexistence) to one of substance (cooperation). The focus of this move was the internal structure of the state. With the move to substance, international law was no longer simply mediating the interaction of territorial units but was now determining the welfare of the citizens of the world. As a result, the move from process to substance became problematic; because it ventured deeper into the heart of sovereign autonomy and culture, it placed a greater strain on the notion of universality (i.e., the degree to which states could and would agree). This point is crucial to this article, which aims to establish how substantive law is constructed or universalized.

In summary, Kennedy's framework suggests that international law is divided into three temporal and spatial contexts: sources, process, and substance and that in the move from process (basic structural rules) to substance (cultural and social norms), the universalizing ability of international law is greatly reduced.

1. Friedmann's Manifesto For Change

In presenting the move from process to substance as represented by the current tradition of international law, Kennedy has been guided by the work of Wolfgang Friedmann.¹⁰ Therefore, to fully appreciate the movement from process to substance, it is helpful to consider Friedmann's work.

8. Kennedy, *New Stream*, *supra* note 5, at 32-4.

9. Kennedy, *New Stream*, *supra* note 5, at 35.

10. It is worthy of mention that Friedmann was a German refugee who had become somewhat of a cosmopolitan globe trotter. It is therefore no wonder that he wished to see the demise of territorial sovereignty in its naked and nastiest form.

The shift from process to substance was articulated with commitment, excitement, and exactitude in Friedmann's seminal work, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* [hereinafter *CSIL*] (1964).¹¹ In his manifesto for the new world order, Friedmann explained that in our time:¹²

- (1) international law was moving from coexistence (process) to cooperation (substance and welfare); and
- (2) that in entering the realm of cooperation, universality would be tested by the religious, economic, and ideological diversity of the world.

For Friedmann, the times were exciting. He was witnessing a move from a classical system of international law focused primarily on the coordination of sovereign activity (process) to a system of international law focused on the welfare of the citizens of the world. Here was a chance to peel back the wrapper of sovereignty and to delve into the internal construction of states in the name of public world order, an international welfare state. In fact, it was the virtual impossibility of there ever being conditions suitable for the exercise of sovereign autonomy in its purest sense that led Friedmann to suggest that sovereignty was a thing of the past. States could no longer exist in a sovereign vacuum; the states, especially the newer and developing ones, needed community.¹³

Friedmann's project was more than just a move from process to substance. In the move, he was able to reassert a new

11. See also WOLFGANG FRIEDMANN, *INTERNATIONAL LAW: CASES AND MATERIALS* (1969), the template upon which Henkin's book of the same name is written.

12. The fact that we are in transition to substance is presented through a continual use of the expression "in our time." See also LOUIS HENKIN, *HOW NATIONS BEHAVE* 20 (1979).

13. FRIEDMANN, *supra* note 2, at ch. 3.

status for international law. It was not just a law of prohibitions that could not be enforced but also a law of positive obligations and benefits that could be pragmatically implemented through rhetoric and practice. The "reality" of international law was evidenced in its ability to structure the discourse of nations and to channel the community of interest--in the new substantive law even more so.¹⁴ International law became more than a sanction or penal statute; it was now a facilitator of communal action.

2. The Move and Universality

In essence, Friedmann's was a project in explaining how the apparent universality of international law would survive the move from process to substance. From the Peace of Westphalia until the late twentieth century, the law of nations, although in a phase of sovereign autonomy, exhibited a universality. This was a universality of coexistence or process. He explained:

The principal preoccupation of the classical international law . . . was the formalization and the establishment of generally acceptable rules of conduct in international diplomacy . . . mainly concerned with the adjustment of territorial sovereignties, the legal status of the high seas, the diplomatic and jurisdictional immunities of states, heads of government and diplomatic representatives, . . . recognition . . . , the protection of subjects . . . and the regulation of war and neutrality.¹⁵

This procedural system did not seek to regulate the internal ordering of states; a product of the fact that before the rise of democracy and liberalism, states were governed by absolutist rulers.¹⁶ Rather, the system sought to coordinate the territorial

14. FRIEDMANN, *supra* note 2, at ch. 8.

15. FRIEDMANN, *supra* note 2, at 5.

16. FRIEDMANN, *supra* note 2, at 5.

blocks known as states.¹⁷ In its operation, the procedural system had an air of universality as it was apparently a neutral system of law, not assessing or interfering with the interests of each nation, but merely coordinating their diplomatic interaction.

The universality of process had been guaranteed by at least two things:

- (1) The fact that it was implemented, practiced, and created by the Club of Europe, Western European Nations having Christian religious values, and
- (2) it was a law of coordination, not substance; it did not seek to interfere with internal ordering in any substantial way.

In moving to a law of cooperation, the internal structure of the state was very much open to assessment. At bottom, the law of cooperation was not a law governing states, but rather the citizens of the world. As the citizens of the world lived very different lives, the points of reconciliation would be difficult to find.

Friedmann earmarked three types of differences: religious, economic, and ideological.¹⁸ These would be barriers to a universal law of cooperation. But even then he hoped that in the space of difference, moments of agreement would be located, perhaps through his loose pragmatic rhetorical practice of international law. For example, in the area of human rights, difference could dissolve through interpretation of the norm and, in this way, law was doing

17. See Anthony Carty, *The Decay of International Law* ch. 4 (1986); ANGHIE, *supra* note 7, at 87 *et seq.*; John G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139 (1993).

18. FRIEDMANN, *supra* note 2, at 6-8. For a current debate over the nature of difference, see Samuel Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22 (1993); Chen Zhou, *Divergence of Cultures: the Principal Root Cause of Modern World's Conflict and War?*

its job by providing a standard from which agreement could be generated.¹⁹

For Friedmann, it was obvious that regional groupings of like-minded states might reach the holy grail of cooperation before states of diverging economy, religiosity, and ideology.²⁰ The European Community was his prime example, as those states had moved from process to substance primarily due to ideological, economic, and religious similarity.

In *Changing Dimensions of International Law*, Friedmann quotes Reuter, who makes the distinction between coexistence and cooperation, suggesting the latter was more likely between states with "a similar culture, internal structure and economic and social philosophies."²¹ This motivated Friedmann to call for the "conception of international law as a stratified structure"²² of universality:

[C]ooperation proceeds today on different levels of universality, depending on the extent of the common interests and the values that bind the participants. Certain types of the new international law are developing today on the universal level, because they reflect universal interests of mankind. Others depending on a more closely knit community of values and purposes proceed on a more restricted level . . . changing with different political configurations.²³

19. FRIEDMANN, *supra* note 2, at 55-7; cf. 63.

20. FRIEDMANN, *supra* note 2, at 62-63.

21. Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147 (1962); FRIEDMANN, *supra* note 2, at 65.

22. FRIEDMANN, *supra* note 2, at 58.

23. FRIEDMANN, *supra* note 2, at 62.

International law can no longer be regarded as one body of principles, rather it is a general description of various patterns and levels of international relations, which are only to a limited extent governed by the same principles.²⁴

The Friedmann project then was aimed at facilitating the move from process to substance, whilst acknowledging that universality would expand and contract relative to the existing community of interest. While he suggested that universality would be stronger amongst likeminded states, he did not ignore the possibility of universal substantive norms amongst "differently" minded states, which is in large part the subject of this article. Friedmann's work is foundational to this article in that it describes a unique area of international law, substantive international law, and highlights how this type of law battles with sovereign autonomy in constructing universal norms.

While Friedmann's work heavily influenced his Columbia Law School colleagues, they did little to expand his notion of universality. It was not until the arrival of Anne Marie Slaughter's work on "law amongst liberal nations" that the issue of universality was given new consideration.

B. *The Post Cold War Euphoria Over Democratic Governance: A Segmented Universality*

Writing a quarter of a century later, in an exuberant environment of post cold war relief and liberation, Anne-Marie Slaughter has argued that liberal states interact amongst each other in international relations in a much deeper and more substantive way than they do with nonliberal states.²⁵ For Slaughter,

24. FRIEDMANN, *supra* note 2, at 367.

25. Anne-Marie Slaughter, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Anne-Marie Slaughter Burley, *International Law and International Relations Theory* 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the UN*, 4 TRANSNAT'L L. & CONTEMP.

continuation of the progress narrative in post cold war America has meant a search for a more expanded yet segmented regional notion of universality, although she appears unwilling to declare it is a theory of universality.

Her aim is to show that universality can be achieved in coexistence or cooperation (she does not really distinguish between them) amongst liberal states with much more strength than amongst other or nonliberal states. Slaughter's work does much to illuminate the arguments that Friedmann initiated in the early 1960's. She fills out that part of Friedmann's theory which suggested universality would be stronger where a community of interest existed. In doing this, Slaughter helps our understanding of the creation of universal norms amongst like-minded liberal states, in such provocative fashion, that one is immediately drawn to inquire how universal norms amongst all states are created.

Slaughter, while exciting and thorough in her analysis, purposefully tells us only half the story; the story of law amongst liberal states, the story of one segment or layer of universality. However, Friedmann envisaged a layer (even if only very weak) of universality amongst a majority if not all the nations in the world. Recent developments in the international protection of intellectual property suggest the existence of substantive norms of international law which are accepted by states of all different complexions. This is the point that I wish to pursue: how do we achieve universal norms of substantive international law in segments, layers, and sectors containing more than just liberal states?

The novelty of Slaughter's approach is in its invocation of international relations theory. She attributes her ability to analyze the cooperative framework of law amongst liberal states to international relations theory and, in particular, the emergence of a liberal theory of international relations: "international relations theorists have a comparative advantage in formulating generalizable

hypotheses about state behavior and in conceptualizing the basic architecture of the international system."²⁶

International relations was formerly preoccupied with realism moved through regime theory and is now at the point where it is starting to consider the internal structuring of states, liberal theory. Realism, focusing on power and hegemony in an anarchical society, is vigorously challenged by liberalism. Liberalism suggests that state action cannot be understood without first appreciating the domestic structure of states, whether they are democratic or non democratic.

Liberal international relations theory focuses on state preferences - the individual foreign policy goals [I]t assumes that the primary determinants of state behavior are not external factors . . . but the nature of the goals . . . themselves [T]he primary actors in the international system are individuals and groups acting in domestic and transnational civil society . . . the nature of domestic representation is the decisive link between societal demands and state policy.²⁷

This raises the very interesting issue of whether universality is possible amongst states with very different internal structures. It does not seem that Slaughter would necessarily deny the possibility of such universality, although her approach raises serious doubts about the strength of such universality, an issue to which we shall return below.

Having introduced, in accord with Kennedy's framework, the distinct notion of substantive international law, and having examined the allied concept of universality, it is now possible to move deeper into the question of how substantive norms can be constructed in the face of difference.

26. Slaughter, *International Law in a World of Liberal States*, *supra* note 25, at 2.

27. *Id.* at 6.

III. RECONCILING DIFFERENCE IN A DIVIDED WORLD

A deeper understanding of substantive norms of international law is acquired through examining the principles, projects, and structures of international jurisprudence and legal regulation. In essence, the backdrop for this article is the story of the different principles of, and projects pursued by, public international law and international trade law. It is through an understanding of these different principles and projects that one can better appreciate the emerging framework for universalizing substantive norms.

The modern international legal system revolves around two principles: trade and peace/war. Trade is a principle of discourse, a pathway, that allows nations to move their persona (primarily for commerce and inherently for survival) beyond the territorial blocks that they inhabit.²⁸ In this sense, trade is a moving or transnational principle while the rest of public international law is concerned with how the territorial block is to be regulated and, in turn, have indirect effects on the outside world (as the principle of peace suggests). The trade principle is concerned with the metaphysical nation in movement, the peace side of things with actions in and against the territorial block. However, as the world moves closer together through things like technology, issues of movement are more likely to be entwined with issues of territorial governance.

28. At an abstract level, it can be said that international law in the realm of substance revolves around two principles. First, the principle of harmonization which requires countries to "regulate" their territorial domains to facilitate peace in pursuit of some good that is supposed to benefit all nations. Second, the principle of movement or trade requires that the channels of interaction through trade be clear so as to allow countries to speak to one another, to move forward, and touch one another in the area of commerce; for if one cannot speak to another, failure in commerce, and ultimately survival, is guaranteed. In the latter dimension, "movement" is the metaphor, while in the former dimension "static" is the metaphor. This is perhaps why trade is so powerful in pulling countries together--it is really a principle of discourse that allows nations to move their persona (primarily for commerce) beyond the territorial blocks that they inhabit. Wolfgang Fikentscher, *GATT Principles and Intellectual Property Protection, GATT OR WIPO? in NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY* 121 (Friedrich-Karl Beier & Gerhard Schricker eds., 1989).

Due to the fundamentally different natures of the two core principles of trade and peace, the international law projects they instigate are very different. In the realm of peace (public international law), the substantive international law project is one of regulating the sovereign difference that emanates from territorial sovereignty, of managing the antinomies in search of common accord.²⁹ In the realm of trade (international trade law), the project is much different. Here, the starting point is a nebulous common accord, that of wealth maximization³⁰ and the need to trade to survive, which the project is designed to facilitate. In one instance (peace), we are heading towards a common accord through regulation (to overcome sovereign difference), quite often without success, while in the other case (trade), we have common accord

29. The tradition of public international law is to view law as a regulatory framework through which to mediate difference and to facilitate sovereign interaction. The project of public international law is one of regulating sovereignties, and thus the closer one gets to world governance through the United Nations, the closer the project is to completion. Today, the project of public international law is embodied in the edifice of the United Nations, in terms such as compliance, resolution, peace, etc., the words of regulating sovereignties. This project of regulating sovereignties is very difficult, and the more one moves from simple international law principles of coexistence to cooperation, the more the regulatory framework is given indifferent respect by states.

30. "[O]verall the Agreement constitutes the prevailing norm of international trade among member states." 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 265 (1987); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 8-14 (1989) [hereinafter WTS]; MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* ch.1 (1995); CHARLES P. KINDLEBERGER, *INTERNATIONAL ECONOMICS* 17-21, 27, 33 (5th ed. 1973); PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* (3d ed. 1994); JAGDISH N. BHAGWATI, *PROTECTIONISM* (1988); RONALD W. JONES & ANNE O. KRUEGER, *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE* (1990); John G. Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

and are regulating to deregulate,³¹ prosper the common accord, and open up the pathway to wealth maximization and survival.³² While the common accord in the latter project is problematic due to its definitional³³ and ideological³⁴ inexactitude, it nevertheless acts as

31. W. Ropke, *Economic Order and International Law*, 86 RECUEIL DES COURS 203 (1954).

32. For an introduction to the different cultures of the internationals, see David Kennedy, *Receiving the International*, 10 CONN. J. INT'L L. 1, 10-20 (1994) [hereinafter *Receiving the International*]; David Kennedy, *The International Style in Postwar Law and Policy*, UTAH L. REV. 7, 8-17, 62-63 (1994) [hereinafter *International Style*]. For Jackson's response, see John Jackson, *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 AM. U. J. INT'L L. & POL'Y 595, 596 (1995). See also MICHAEL GADBAW & ROSEMARY E. GWYNN, *Intellectual Property Rights in the New GATT Round*, in INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 42-43, 46-47 (Gadbaw & Richards eds.). On the issue of developing countries and GATT, see WTS, *supra* note 30, 275-281 (1989); JOHN H. JACKSON, ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS ch. 24 (3d ed. 1995) [hereinafter LPIER]. The two systems stand apart, one public, aiming for a common regulatory point, the other private, motivated by common accord and striving for exploitation of that accord through deregulation. See Fikentscher, *supra* note 28, at 121 (herein lies the threads of a public and private distinction). See also NORBERTO BOBBIO, DEMOCRACY AND DICTATORSHIP 1-21 (Peter Kennealy trans., 1989); Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149; Karen Engle, *Views from the Margins: A Response to David Kennedy*, 7 UTAH L. REV. 105 (1994). They both serve to alter sovereign capacity, but from different starting points, for different reasons, and in pursuit of different end points.

33. The inexact guiding premise calls for "[T]he substantial reduction of tariffs and other barriers to trade and . . . the elimination of discriminating treatment in international commerce." Preface of GATT. See generally JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT PART II (1969) [hereinafter WTLG]; LPIER, *supra* note 32, at chs. 8-11; WTS, *supra* note 30, at chs. 5-11; MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 283-87 (2d ed. 1993).

34. The principle of comparative advantage is open to many criticisms. For a public choice perspective, see Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995). See also Jagdish Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 N.Y.U. J. INT'L L. & POL'Y 219 (1993); Arjun Appadurai, *Disjunction and Difference in the Global Cultural Economy*, 2 PUB. CULTURE 1

a popular foundation to a massive trade regime. It appears as the one true universal principle of substantive international law. While we may question the morality or efficiency of comparative advantage, the trade principle seems more than that: it is a principle of discourse that all countries seek for survival. The essence of universality, then, may lie not so much in the notion of comparative advantage, but in the need to survive and to speak to other countries in commerce through open channels of communication.

The interesting issue raised by recent events is whether the trade regime (which exudes a universality) can, or inevitably will, be substituted for the public international regime (which struggles to achieve accord) to produce a dynamic new framework for universalizing substantive international law. In other words, is the universalizing strength of the trade regime the key to universalizing substantive international law? Recent developments in international trade law suggest an affirmative, yet largely unproven, answer.

The Uruguay Round of the GATT has seen a joining of the two principles and projects of international law in the one regime.

(1990); RICHARD N. COOPER ET AL., *CAN NATIONS AGREE?* (1989); DAVID Z. RICH, *THE ECONOMICS OF INTERNATIONAL TRADE* (1992); PAUL KRUGMAN, *DEVELOPMENT, GEOGRAPHY AND ECONOMIC THEORY* (1995); PAUL KRUGMAN, *POP INTERNATIONALISM* (1996); Robert O. Keohane, *Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967-1977*, *CHANGE IN THE INTERNATIONAL SYSTEM* 131-62 (Ole R. Holstri et al. eds.) (1980); Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 *WORLD POL.* 317 (1976); Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 *INT'L ORG.* 579 (1985); DAVID A. LAKE, *POWER, PROTECTION, AND FREE TRADE: INTERNATIONAL SOURCES OF U.S. COMMERCIAL STRATEGY, 1887-1939*, (1988); John Conybeare, *Tariff Protection in Developed and Developing Countries: A Cross Sectional and Longitudinal Analysis*, 37 *INT'L ORG.* 441 (1983); Edward D. Mansfield & Marc L. Busch, *The Political Economy of Nontariff Barriers: A Cross-National Analysis*, 49 *INT'L ORG.* 723 (1995); Isabelle Grunberg, *Exploring the "Myth" of Hegemonic Stability*, 44 *INT'L ORG.* 431 (1990); Timothy J. McKeown, *Hegemonic Stability Theory and 19th Century Tariff Levels in Europe*, 37 *INT'L ORG.* 73 (1983); Fred H. Lawson, *Hegemony and the Structure of International Trade Reassessed: A View from Arabia*, 37 *INT'L ORG.* 317 (1983); Joanne Gowa, *Democratic States and International Disputes*, 49 *INT'L ORG.* 511 at 519-521 (1995); Peter J. Katzenstein, *International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrial States*, 30 *INT'L ORG.* 1 (1976).

In the new World Trade Organization [hereinafter WTO] charter (which incorporates GATT), the core principle of trade is combined with the regulation of substantive issues such as intellectual property, namely the Agreement on Trade Related Aspects of Intellectual Property [hereinafter TRIPS], which would have formerly been regulated under the traditional public international law regime as aspects of peace. This combination of trade and peace suggests a new framework through which to construct substantive international law.

The Uruguay Round of the GATT has presented us with a trade structure that no longer seeks only to deregulate or regulate in the name of some narrow universal principle of free trade, but that seeks to regulate sovereignties for the purpose of finding universality. This, in an attenuated sense, is then claimed to facilitate and reinforce the core principle. To get to this point, the trade regime, through the notion of "packaging," universalizes the norms attached to the core principle. It starts with the basic premise that every state in the world wants to maximize wealth and builds outward through substantive extensions. But will the marrying of trade and peace and their ensuing projects be a success?

Vital to such an analysis is an understanding of the fact that the movement of the trade regime into the business of regulating national cultures, or managing sovereign difference (formerly the project of public international law), has occurred through the mechanism of appendage, packaging, and linkage. To this end, this article is designed to establish the conditions necessary for such appendage or linkage and to find out when and why this packaging of trade and peace (read culture) in a process of universalizing substantive international law is effective. Throughout this article, my focus is on GATT/WTO and the embracing of intellectual property, with supplementary references to the European Community and the dilemma over human rights,³⁵

35. By way of introduction, see J.H.H. Wiler & Nicolas Lockhart, *The European Court of Justice: Taking Rights Seriously?*, 32 COMMON MKT. L. REV. 51,57 (1995).

and NAFTA,³⁶ and its handling of environmental concerns.

IV. THE DEVELOPMENT OF TRADE-BASED CONSTITUTIONALISMS: GATT

In further analyzing the potential of international trade law to provide a universalizing framework, it is necessary to consider more closely the development of the trade regime up to the point where it has embraced substantive issues of intellectual property law, in what is starting to resemble a constitutionalism³⁷ as opposed to a mere international agreement.

A. *The WTO/GATT: An Outline*

1. History

Throughout the development of international society, trade has been a constant theme. Trade has been a discourse along with war molding international society. Without these two principles of "greed" and "domination," international society would have been redundant. After the mapping of states and the territorialization of the world, trade has become a metaphor for the movement and flow of transnational events.

36. See Symposium, *NAFTA at Age One: A Blueprint for Hemispheric Integration?*, 10 CONN. J. INT'L L. 221 (1995).

37. See *supra* note 3 and accompanying text. On the core constitutional principles of GATT, see Fikentscher, *supra* note 28, at 113-119 (invoking a notion of static and dynamic principles). See also George Scowzenberger, *The Principles and Standards of International Economic Law*, 117 RECUEIL DES COURS 1-98 (1966); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAW AND FOREIGN TRADE POLICY IN THE UNITED STATES (1991). Contrast European case law that suggests GATT does not have a direct effect for the purpose of providing justiciable rights under Art. 177 of TEEC; *International Fruit Co. v. Produktschap*, 1972 E.C.R. 1219, 2 C.M.L.R. (1975); *FEDIOL v. Commission*, 1989 E.C.R. 1781, 2 C.M.L.R. 489 (1991); *Germany v. Council (Bananas Case)* 1994 E.C.R. I-4973, 110-11, although this view will be surely questioned in light of the strengthened and compulsory dispute settlement process of the World Trade Organization.

Trade appears as the one true universal substantive principle of the modern era. This seems to explain the rise of GATT from the ashes of the crippling trade wars of the early twentieth century, where closing the channels of discourse lead to difficulties, resentment, and ultimately war.³⁸ In response to these events seen as repugnant, states, led by the United States of America, rallied to gather support for an international trade regime. GATT was by no means the first trade agreement between nations,³⁹ but has become a formidable multilateral edifice.⁴⁰

The guiding premise of GATT was that "liberal trade and other freedoms for economic transactions would best promote the welfare of all in the world, based on well established economic theories of comparative advantage, gains from trade, and economies of scale."⁴¹ To this end, GATT rose to control tariff and non-tariff barriers to trade and to mandate Most Favored Nation [hereinafter MFN] and national treatment.⁴²

2. Development

GATT, a conglomeration of over 200 treaties, while not an organization, became a substitute for one after the failure of the

38. WTLG, *supra* note 33, at 35-57; JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 9-17 (1990) [hereinafter RGS].

39. WTLG, *supra* note 33, at 249-272.

40. On the general themes that underpin GATT, NAFTA, and the EC, see MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 25-55 (1995).

41. John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round*, 14 U. ARK. LITTLE ROCK L.J. 429, 441; WTS, *supra* note 30, at 8 *et seq.*; LPIER, *supra* note 32, at 7 *et seq.*

42. WTLG, *supra* note 33, at 194; Jan Tumlrir, *GATT Rules and Community Law - A Comparison of Economic and Legal Functions*, *THE EUROPEAN COMMUNITY AND GATT* 1, 1-10 (Meinhard Hilf et al. eds., 1986).

United States to support the International Trade Organization.⁴³ GATT Conferences or Rounds were held periodically, and through these the momentum and definition of free trade continued to expand.⁴⁴ However, it has been the recently concluded Uruguay Round (1986-1994) that has given the GATT system its greatest leap forward since inception.

3. Uruguay Round and the New WTO Charter

The Uruguay Round led to the birth of the WTO and a treaty package that promised to solve many of the "birth defects"⁴⁵ of GATT. The package consists of the WTO charter which includes four annexes. The first and second annexes are of particular relevance to this article. Annex 1A contains the GATT as amended to 1994; Annex 1B contains GATS, the extension of the trade regime to services; Annex 1C concerns TRIPS; and Annex 2 contains an obligatory and unitary dispute settlement process.

The WTO agreement establishes the GATT as a full fledged treaty⁴⁶ with members and redesigns the organizational processes (e.g., membership and decision-making).⁴⁷ Of particular interest is the new dispute settlement structure employed in the

43. WTLG, *supra* note 33, at 35-57; LPIER, *supra* note 32, at 293-296; WILLIAM DIEBOLD, *THE END OF ITO* (1952).

44. See LPIER, *supra* note 32, at 289-301; ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 7-9, 11-15 (1993) [hereinafter EITL].

45. LPIER, *supra* note 32, at 296. With respect to the lack of an official organizational structure and the provisional status of GATT, see *Protocol of Provisional Application of the GATT*, 55 UNTS 308 (1947).

46. On the constitutional validity of the WTO agreement, see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

47. LPIER, *supra* note 32, at 301-313; Thomas J. Dillon Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995).

WTO charter.⁴⁸ Under the old regime, disputes were considered pursuant to GATT Art. XXIII by a panel of three experts, and the report was then submitted to the GATT Council for adoption.⁴⁹ As the GATT system, in practice, worked according to consensus decision making, a Member State who was the subject of an unfavorable panel report could in theory "block" the adoption of the panel report.⁵⁰

The WTO charter changed all of this by confirming the trade regime's movement from a power-oriented to a rule-oriented dispute resolution procedure.⁵¹ The new procedure provides for: a) consultation, optional conciliation, or mediation; if these fail: b) the dispute moves on to a panel hearing; the panel reports its findings to the Dispute Settlement Body (i.e., the General Council) in a procedure which assumes adoption unless there is a consensus against adoption (reverse consensus); c) any party to the dispute can appeal to the Appellate Body, whose report is adopted unless overturned by reverse consensus; d) if the report is adopted, its implementation is monitored, and if the situation is not remedied, automatic suspension of concessions or a claim for compensation will arise.⁵²

48. See generally Alec Stone, *The New GATT: Dispute Resolution and the Judicialisation of the Trade Regime* (paper delivered at International Law and International Relations Seminar, Harvard Law School, Fall 1995); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829 (1995).

49. WTS, *supra* note 30, at 94-97.

50. LPIER, *supra* note 32, at 342-43.

51. On the distinction between power-oriented and rule-oriented dispute resolution, see WTS, *supra* note 30, at 85-88; cf. EITL, *supra* note 44, at 364-65; ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed. 1990).

52. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Arts. 1-19 [hereinafter DSU]; LPIER, *supra* note 32, at 340-44. On its application to TRIPS, see DSU Appendix 1.

In making it possible, though not desirable,⁵³ for automatic retaliation procedures in the new dispute resolution system, the trade regime has bowed to the practice of the United States and the EEC, who prior to 1994 had unilaterally invoked trade retaliation measures.⁵⁴ Importantly, retaliatory measures can be exacted in relation to any concession; they do not have to be related in any way to the dispute at hand. This is a powerful enforcement mechanism, particularly against a developing country that breaches obligations under TRIPS but has no reciprocal industry to be affected by retaliation. Further enforcement of the trade regime depends on transparency and monitoring (e.g., in TRIPS).⁵⁵

4. Uruguay and the Addition of Substance: TRIPS⁵⁶

The new WTO charter not only reinvigorated the GATT regime but also tied intellectual property rights to the trade regime. Intellectual property rights (copyright, patent, and trademarks) have been the subject of traditional public international law conventions,

53. DSU, *supra* note 52, at art. 22.

54. Trade Act of 1974, § 301; Council Regulation (EEC) 2641/84; WTS, *supra* note 30, at 103-9; EITL, *supra* note 44, at 43.

55. See WTS, *supra* note 30, at 113; Abram Chayes & Antonio H. Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION L.J. 311 (1991); Abram Chayes & Antonio H. Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); ABRAM CHAYES & ANTONIO H. CHAYES, *THE NEW SOVEREIGNTY* (1995); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ, and Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994).

56. See generally David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385 (1995); Michael L. Doane, *TRIPS and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U. J. INT'L L. & POL'Y 465 (1994); David Nimmer, *GATT's Entertainment: Before and NAFTA*, 15 LOY. L.A. ENT. L.J. 133 (1995) [hereinafter GATT's Entertainment].

known as the "Great Conventions," since the late 19th century.⁵⁷ Aspects of these Conventions, however, were not acceptable, especially to developing countries,⁵⁸ and thus compliance and enforceability were frustrated.⁵⁹

The solution was to append an intellectual property regime to the GATT in the form of *Annex 1C: Trade Related Aspects of Intellectual Property* (TRIPS). As far as copyright is concerned TRIPS works to incorporate the Berne Convention (excepting moral rights) into the WTO structure.⁶⁰ As the Berne Convention was a harmonization treaty, the concern in relation to copyright was the level of compliance with the treaty, more so than raising the level of protection required by the treaty.⁶¹ This required two things: (1)

57. See *Paris Convention for the Protection of Industrial Property* (1883) [hereinafter *Paris Convention*]; *Berne Convention for the Protection of Literary and Artistic Works* (1886) [hereinafter *Berne Convention*]. On the Paris Convention see A. Bogisch, *The First Hundred Years of the Paris Convention for the Protection of Industrial Property*, INDUS. PROP. 191 (1983); STEPHEN P. LADAS, *PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION* (1975). For a comprehensive account of the Berne Convention, see A.M. RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* (1987).

58. See Kenneth Abbott, *Protecting First World Assets in the Third World*, 22 VAND. J. TRANSNAT'L L. 689 (1989); DAVID SILVERSTEIN, *INTELLECTUAL PROPERTY RIGHTS, TRADING PATTERNS AND PRACTICES, WEALTH DISTRIBUTION, DEVELOPMENT AND STANDARDS OF LIVING: A NORTH-SOUTH PERSPECTIVE ON PATENT LAW HARMONIZATION*; MAUREEN IRISH, *Intellectual Property and North-South Relations in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM* 155, 155-87 (George R. Stewart et al. eds., 1994).

59. Kurt Chang, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206, 213 (1994); GATT's ENTERTAINMENT, *supra* note 56, at 135.

60. See TRIPS, arts. 2, 3, 9.

61. Frank Emmert, *Intellectual Property in the Uruguay Round - Negotiation Strategies of the Western Industrialized Countries*, 11 MICH. J. INT'L L. 1317, 1340 *et seq.* (1990); GATT's ENTERTAINMENT, *supra* note 56, 144 *et seq.* However, TRIPS does alter the Berne commitments in a distinct way by

convincing countries who are not a party to Berne (especially those where copyright infringements might occur, such as Singapore, Korea, and Taiwan) to become part of the Union; and (2) implementing a sophisticated monitoring system to facilitate compliance.⁶² Issues of protection lying outside the Berne Convention, such as rental, performers', producers', and broadcasters' rights are also covered by TRIPS.⁶³ The TRIPS agreement, therefore, is interesting in that it unifies membership of Berne, extends the protection of Berne, and installs transparent and enforceable compliance mechanisms.

In relation to patents, TRIPS needed to do more since the Paris Convention was not a harmonization treaty, but rather it merely secured national treatment (i.e., the same protection of foreign patents as that given to domestic patents.)⁶⁴ But this type of protection was contingent upon the country in issue having patent protection; if it did not have patent protection, then the Paris Convention was useless. This left patent protection (including subject matter, life, and compulsory licensing) at the mercy of each Member State.⁶⁵ Furthermore, India, Singapore, and Taiwan were major players who were not party to the Paris Convention, and it was vital to have them as part of the international regime for the protection of patents. To remedy this situation, TRIPS harmonizes patent law in Member State countries through a basic requirement to provide patent protection for 20 years.⁶⁶ In relation to patents,

introducing a Most Favored Nation [hereinafter MFN] obligation into international copyright obligations. See TRIPS, Art. 4.

62. TRIPS, PART III on enforcement, PART V on dispute prevention.

63. TRIPS, Arts 11-14.

64. Paris Convention, Art. 2; see Emmert, *supra* note 61, at 1340; PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES (3d ed. 1993).

65. B.S. Chimni, *Political Economy of the Uruguay Round of Negotiations: A Perspective*, 29 INT'L STUDIES 135, 148 (1992).

66. See generally TRIPS, Arts. 27-34.

TRIPS is interesting because it harmonizes patent law, unifies and increases membership in the international regime protecting patents, and installs transparent and enforceable compliance mechanisms.

TRIPS does much to universalize international intellectual property law and to implement an enforcement mechanism which is independent of the consent of states and has a potent deterrent in retaliation. The questions then arise: how does it achieve such remarkable results and how can it be sustainable? The seeds of an answer (explaining the motivations for aligning with the trade regime) are planted by Jackson et al., when they suggest:

Attempts by the United States and other countries to address these issues in WIPO [World Intellectual Property Organization] had proved unsuccessful, in large part because of the wide divergence of views on intellectual property rights in that organization. Moreover in a single issue forum, such as WIPO, there was no possibility of securing changes in intellectual property laws in exchange for concessions on other trade issues, as there is in GATT.⁶⁷

Statements by Emmert support this theory to the effect that:

. . . WIPO conventions date back to the 19th century and although they have been revised occasionally, they have failed to meet the challenges posed by the increasingly interdependent First and Third World with their conflicting interests and to keep up with the development of radically different technologies. After futile attempts to negotiate improvements within WIPO and faced by rapidly increasing financial losses of western IP owners, the WIC's [Western Industrialized Countries] are now

67. LPIER, *supra* note 32, at 885.

disillusioned with WIPO and have turned to the GATT.⁶⁸

B. *From WIPO into GATT*

These statements suggest that the World Intellectual Property Organization [hereinafter WIPO],⁶⁹ an arm of the United Nations and part of the traditional public international law structure, could not adequately solve the problem of intellectual property (especially patent) protection⁷⁰ for at least three reasons. Firstly, because of the factions amongst Member States; secondly, because it was a "single issue forum"; and thirdly, because it had weak enforcement powers. These three reasons acted as the primary motivations for the movement from WIPO into GATT.

Within WIPO, UN-style voting blocks persisted, making it very difficult for the developed countries to set and implement an agenda.⁷¹ On the other hand, in the Uruguay Round of the GATT, voting blocks were much more difficult for developing countries to achieve due to self interest, the multifarious nature of the negotiations, and inexperience in the GATT context.⁷² However, Professor Chimni has suggested that once the Uruguay Round moved to add the substantive topic of intellectual property to the trade regime, a "global coalitional strategy" should have come to

68. Emmert, *supra* note 61, at 1398-9.

69. For a more extensive study of the World Intellectual Property Organization, see THE FIRST TWENTY FIVE YEARS OF WIPO (World Intellectual Property Organization ed., 1992).

70. See also GADBAW & GWYNN, *supra* note 32, at 49-52. Patent protection was a greater problem than copyright protection (see *id.* at 10-11, 54, 56) and this is reflected in TRIPS agreement as a substantial improvement in patent law.

71. Emmert, *supra* note 61, at 1343; FIKENTSCHER, *supra* note 28, at 25.

72. Chimni, *supra* note 65, at 141. "... Third World countries are at their weakest inside GATT, in terms of collective organization and bargaining. They do not negotiate or bargain collectively inside GATT." *id.*; CHARKRAVARTY RAGHAVAN, RECOLONISATION: GATT, THE URUGUAY ROUND AND THE THIRD WORLD 60 (1990).

the fore.⁷³ As Chimni explains, this did not happen because the developing countries succumbed to the "divide and coerce" strategy of the developed countries, reinforced by bilateral threats of retaliation against India and Brazil in particular.⁷⁴

Allied to the notion of voting blocks is the negotiating framework of the respective institutions. WIPO is said to be a single issue fora, while GATT is seen as a multi-issue forum in which compromise and packaging are more likely.⁷⁵ Thus, GATT is seen as a negotiating framework in which the "need to speak (trade) freely" is used to temper other demands.

Additionally, the enforcement mechanisms of the Berne and Paris Conventions were seen to be ineffective. The Paris Convention was expressly linked to the International Court of Justice, but the majority of Member States never accepted the compulsory jurisdiction of the ICJ. Of those states which did accept ICJ jurisdiction, few were willing to risk diplomatic relations by suit in the World Court.⁷⁶ Generally, the Great Conventions were protected through traditional international law mechanisms (primarily the International Court of Justice) which were ineffective due to the ability of states to avoid the jurisdiction of international tribunals.⁷⁷ Exacerbating this was the lack of membership of key players such as India, Taiwan, and Singapore. Emmert explains, "[a]s long as these problems are not addressed by WIPO, the dispute settlement system is effectively worthless."⁷⁸

The agenda of WIPO through the 1980's was to achieve that which TRIPS finally achieved in 1994, harmonization of, and compliance with, intellectual property laws. However, WIPO was

73. Chimni, *supra* note 65, at 141.

74. Chimni, *supra* note 65, at 141-3.

75. Fikentscher, *supra* note 28, at 25.

76. Emmert, *supra* note 61, at 1343; *GATT'S Entertainment*, *supra* note 56, at 135.

77. *GATT'S Entertainment*, *supra* note 56, at 135.

78. Emmert, *supra* note 61, at 1343.

in the public international law tradition seeking to regulate sovereignties enroute to universal substantive international law, and its success in doing so was poor. How then did the GATT regime succeed in this universalizing process when WIPO could not?

Admittedly, in GATT the starting premise is different. All Member States agree in free trade, because all need to trade to survive, and more trade hopefully brings more wealth. But one needs to go a long way before one can claim that the protection of intellectual property, within the boundaries of one country, falls within the international trade paradigm.

Obviously, the lack of a developing country's "coalitional strategy," a broader negotiating context, and stronger enforcement measures in the trade regime provided a comfortable setting for TRIPS. However, the real question concerns why and how intellectual property (a peace issue) can be linked to the trade regime GATT (in preference to WIPO) and with such effectiveness. The linking of intellectual property to international trade is a vital strategy to understand, for it is through this action that substantive intellectual property law is removed from the public international law project and incorporated into the trade regime. The vital question becomes, what makes it possible to incorporate intellectual property protection in the trade regime?

A short answer is that linkage occurs with effectiveness because the trade regime brings a new and dynamic perspective to the regulation of intellectual property which facilitates the unique nature of such property.

V. LINKING SUBSTANTIVE LAW TO THE TRADE REGIME

A. *The Notion of "Linkage"*

This moves us to the question of the linkage⁷⁹ of substantive issues, like intellectual property, to the trade regime, and how this

79. On the notion of linkage see R.N. Cooper, *Trade Policy is Foreign Policy*, 9 FOREIGN POL'Y 18 (1972-3); E.B Haas, *Why Collaborate?: Issue-Linkage and International Regimes*, 32 WORLD POL. 357 (1980).

comes about, under what conditions and for what reason or justification.⁸⁰

While it is easy to think of intellectual property as linked to trade, it is also easy to think of intellectual property as closely linked to culture (peace).⁸¹

1. Linkage on the Basis of Free Trade: By Analogy With the Commerce Clause

Linkage in any common endeavor will normally arise in two ways: firstly, because the component being linked (here intellectual property) is in fact an integral part of the core or cog (here international trade) and must be recognized as a natural component, or secondly, it may be linked to the core activity (trade) due to its impact upon that activity.

80. On the linkage of intellectual property to GATT prior to TRIPS, see GATT arts. III(4) and XX(d); Jerome Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 689, 756 (1989) 827 *et seq.*; WTLG, *supra* note 33, at 511-12, 741-5; William Alford, *Forum: Taiwan and the GATT: Panel Three: Intellectual Property, Trade and Taiwan: a GATT-Fly's View*, COLUM. BUS. L. REV. 97, 98 (1992) [hereinafter GATT-Fly]. On the relationship between measures designed to secure compliance with domestic intellectual property laws and GATT, see *United States - Section 337 of the Tariff Act of 1930*, GATT Panel Report Adopted November 7th 1989, 36th Supp. BISD 345 (1990); *United States - Section 337 of the Tariff Act of 1930 The Case of Certain Aramid Fibre* GATT Panel report Adopted November 7th 1989, 36 Supp BISD 345 (1990). See also GATT arts. XII:3(c), XVIII:10; Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View From the South*, 22 VAND. J. TRANSNAT'L L. 243, 247-251 (1989).

81. "Some would have [international economic law] cast a very wide net, and embrace almost any aspect of international law that relates to any sort of economic matter. Considered this broadly, almost all international law could be called international economic law because almost every aspect of international relations touches in one way or another on economics." See WTS, *supra* note 30, at 21. See also Daniel Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987); International Symposium, *Intellectual Property Law*, 27 GEO. WASH. J. INT'L L. & ECON. 301 (1993-1994).

This common theory of linkage is manifested when considering, by way of analogy,⁸² jurisprudence surrounding Article 1, Clause 8 (3) of the U.S. Constitution. This clause of the Constitution, known as the Commerce Clause, was designed to give Congress, at the expense of the states, the legislative power to regulate commercial activity in pursuit of a common market in which goods could move freely.⁸³ Thus, there is much conjecture in interpreting this clause over how far ancillary or incidental issues to interstate commerce can be linked to the affirmative power. Recently the U.S. Supreme Court has interpreted the Commerce Clause so as to allow Congress to regulate the channels, instrumentalities of, and people in, interstate trade, and those activities that substantially affect interstate commerce.⁸⁴ The former things or activities, channels, instrumentalities, and people are regarded as being part of the core activity of interstate trade and thus are understandably open to trade based regulation. The latter activities, activities that substantially affect trade, are activities that are linked to trade to justify regulation. It is the linkage of these issues to the Commerce Clause that raises questions similar to those raised in justifying linkage of intellectual property to GATT.

To analogize, in international trade the channels and instrumentalities of entry to other nations' markets are most easily seen as the basis of GATT, especially considered in light of its founding purposes: the reduction of tariffs and other trade barriers. However, when one moves beyond the actual flow or exchange of goods in transnational movement to, for example, the system of

82. The Commerce Clause seems an appropriate analogy as it has worked to underpin the common market created by the U.S. federal system of governance. Sections 51 (1) and 92 of the Australian Constitution, which codify the Commerce Clause and its ensuing case law, *Cole v. Whitfield* (1988), 165 CLR 360, highlight how the commerce clause has been an integral part in constructing the common market of the United States of America. *See COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* (T. Sandalow & Eric Stein eds., 1982).

83. JAMES MADISON, *THE FEDERALIST* NOS. 41, 42; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 403-6 (2d ed. 1988).

84. *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (1995).

property rights protecting intangible goods, then the justification for linkage to the trade based regime becomes much more vital and as a consequence, closely scrutinised.

The *prima facie* claim is that intellectual property is apt for regulation in GATT because it impacts upon trade.⁸⁵ As the world has become more complex, the notion of "trade barriers" has started to expand to cover not just quotas and subsidies, but also issues of environmental, labor, and property regulation that substantially affect trading.⁸⁶ In essence, and Commerce Clause jurisprudence bears this out, nearly any regulation could be seen as affecting international trade and thus labelled a non tariff barrier to trade.⁸⁷

85. See William Alford, *Intellectual Property in East Asia: How Theory Does--And Does Not--Matter: American Approaches To Intellectual Property Law In East Asia*, 13 UCLA PAC. BASIN L.J. 8 (1994).

86. Braga, *supra* note 80 at 244, suggests: "Differences among national intellectual property systems are tantamount to non tariff barriers (NTB's) to trade insofar as they may affect trade in knowledge-intensive products."

87. Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 *Harv. Int'l L.J.* 48 (1993); LPIER, *supra* note 32 at 1206-10. There must be a stopping point where it would sound silly or unpersuasive to suggest that some domestic activity is a trade barrier. By way of analogy, see the ECJ's narrowing interpretation of ART 30 in *Cinetheque SA v. Federation Nationale des Cinemas Francais*, 1 C.M.L.R. 365 (1986), and *Keck and Mithouard*, 1993 E.C.R. I 6097, wishing to respect Member State's cultural autonomy. Consider also Art. 128, Treaty Establishing the European Community [hereinafter TEEC]. In the EC, property rights in general (Art. 222 TEEC) and intellectual property rights in particular (Art. 36 TEEC) are seen to be so remote from trade that their existence alone, as opposed to their exercise in a supranational context, is not regarded as a barrier to trade. See *Centrafarm BV v. Sterling Drug Inc.*, 2 C.M.L.R. 480 (1974); *GEMA*, 2 C.M.L.R. 44 (1981); *EMI Electrola GmbH v. Patricia Im-und Export*, 1989 E.C.R. 79; PAUL CRAIG & GRAINNE DE BURCA, *TEXT CASES AND MATERIALS* ch. 23, 1062-64 (1995); Case 1/94 (1994) E.C.R. I-5267 paras. 55, 57, 59, 103. However, intellectual property rights can and have been subject to harmonization measures in the EC (Art. 100A TEEC). GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 422-27 (1993), Supp. 98-99 (1995); Ysolde Gendreau, *Copyright Harmonisation in the European Union and in North America*, 20 COLUM. J.L. & ARTS 37 (1995); Paul Waterschoot, *An Overview of Recent Developments in Intellectual Property in the European Union* (Paper delivered at Fordham University Law School, April 11, 1996). The result

In summary, it appears as though linkage of intellectual property to the trade regime is made according to a similar principle that governs the Commerce Clause. This requires the satisfaction of a "substantially affects trade" criterion. In Commerce Clause jurisprudence, this criterion has required proof of an economic impact on interstate trade; yet recently, the Court has suggested areas of traditional state concern or regulation are less suitable for regulation under the Commerce Clause.⁸⁸ If one were to follow this principle through to international trade, then it might be said that issues of traditional state concern, such as property rights, should not be regulated on the basis of creating free trade. However, the framers of the new trade constitutionalism (WTO), have ignored such analogy and included the issue of intellectual property in the trade regime in a hope to thwart the "distortion" of trade⁸⁹ (an economic impact). Therefore, the analogy with the Commerce Clause, while alerting us to the fact that linkage is a key concept in trade based regulation, does not adequately explain why, in this case, linkage has occurred. Under Commerce Clause jurisprudence, this type of regulation would be seen as something too far removed from interstate trade to justify regulation. In essence, the problem is with the structure and capacity of the property rights regime, which is a distinct and separate concept, having impact on trade, but not in itself being a trade, pathway, or exchange issue.

The Commerce Clause analogy could be discounted by international trade lawyers as being a unique product of American federalism, where the power to regulate copyright and patents is

is that the question of property rights is drawn into the trade regime, not so much as an issue of or related to trade, but rather to *facilitate* trade. More truthfully, this occurs because the property regime is itself ineffective in generating wealth.

88. Lopez, *supra* note 84, at 1630, 1633-4, 1637-40. This view can be traced back to Chief Justice Marshall's initial distinction between the "commerce" and "police" powers in *Gibbons v. Ogden*. See TRIBE, *supra* note 83, at 405-6.

89. Reichman, *supra* note 80 at 756. On the notion of "distortion of trade," see *Commission v. Italy*, 1980 E.C.R. 1099.

held by the federal national government.⁹⁰ Such a move though is inherently destabilising, as the Commerce Clause forms what has been for many years one of the best examples of a common market. Thus, if the Commerce Clause does not allow for the regulation of property rights, serious doubts must arise from a free trade perspective as to whether the regulation of property rights is a free trade issue. It seems by analogy with the Commerce Clause that free trade is a principle of exchange which has little to do with the legal creation as opposed to production of exchangeable products or property rights. The conclusion then is that while a denial of intellectual property rights "distorts" trade and is "tantamount to a NTB," the linkage of TRIPS to GATT cannot be justified on the basis of free trade. This linkage does much more than promote free trade; it defines the very commodities of trade, and in doing so pushes us towards a deeper inquiry into linkage.

2. A Deeper Foundation for Linkage: The Principle of Ubiquity

As Commerce Clause jurisprudence suggests, the regulation of property rights, as opposed to the channels of exchange,⁹¹ is a traditional concern of states; thus something over and above its economic impact on international trade must justify linkage.⁹²

This further justification appears to lie in a principle we might call "ubiquity." The principle of ubiquity arises from the intangible and informational (ubiquitous proprietorial) nature of intellectual property and promises to become even more pervasive with expanded use of the internet, an ubiquitous technology.

The substance of intellectual property is a mental thought process manifested in tangible form: for example, expression fixed in a tangible medium of expression,⁹³ or an invention explained in

90. U.S. CONST. art. I, § 8, cl. 8.

91. Finkentscher, *supra* note 28, at 121.

92. See GADBAW & GWYNN, *supra* note 32, at 3-4, 17, 32.

93. 17 U.S.C. § 102.

tangible written claims, specifications, and drawings.⁹⁴ The manifestation of the information in tangible form, while important for legal protection, does not remove the ubiquitous properties of the information. In other words, while a useful invention may be built, this will not prevent the (intangible) thought process behind the invention from being spread across the world, as information has no unique, solitary, or exact locus, except that which transmission dictates. On the other hand, physical or tangible property is wedded to an exact locus usually rehearsed in a discourse of territoriality.⁹⁵

Thus, information is a primary example of the principle of ubiquity. This principle of ubiquity impacts upon many things, most significantly for the purpose of this article, the construction of a property regime (intellectual property) that can drive a market in information, a market that has grown rapidly in the last twenty years.

The property regime that is constructed by TRIPS is premised on the notion that the information covered by TRIPS is ubiquitous and needs to be protected through an international harmonization process. It seems then that because traditional public international structural rules for protecting property⁹⁶ (a project of coexistence) have failed to adequately protect ubiquitous property, the international community has moved to implement substantive norms of intellectual property, in an attempt to raise protection of property, through harmonized intellectual property laws.⁹⁷ In substance, it is suggested that a state refusing intellectual property protection is expropriating foreign intellectual property, which is

94. 35 U.S.C. §§ 111-113.

95. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 521-543 (4th ed. 1990).

96. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1986); BROWNLIE, *supra* note 95.

97. Reichman, *supra* note 80, at 796 *et seq.* In the realm of tangible property, the existence of property is assumed, while in the case of intangible property, property must be established; the former therefore is a question for coexistence norms, the latter for cooperation norms.

not easily undertaken in the realm of physical property.⁹⁸ The way to avoid such a surreptitious taking is to ensure that all states have harmonious intellectual property laws.

But how has this substantive protection been linked with the trade regime, in preference to the traditional public international law regime? The answer seems tied to the notion of ubiquity and movement. The international trade regime is premised on a principle of trade, of movement beyond the territorial block. On the other hand, the traditional public international law regime has focused on action in and against the territorial block. As far as physical property is concerned, its unique and exact relationship with territory (*situs*) has made the structural or coexistence principles of public international law the natural mode for its global protection. However, the nature of intangible property is different. It is ubiquitous and thus less adequately protected through the territorial based system of public international law.

However, the international trade regime which facilitates the movement of states presents a logical mode for protecting ubiquitous, intellectual, or informational property. For in a regime premised on states, in movement (itself somewhat of a ubiquitous concept) it is much easier to attach an international property regime for free floating intangible property. The fundamental theme of the trade regime, the need to move, and to communicate in commerce is extrapolated into a scheme for the international protection of intellectual property, which itself is premised on the notion of

98. Reichman, *supra* note 80, at 809-11. Cf. the view that intellectual property is a privilege issued at the whim of the sovereign. Reichman, *supra* note 80, at 800; S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 15-17 (1938); or the view that developing states have a right to exercise complete sovereignty over economic matters, see Art. 2 (1), Declaration on the Establishment of a New International Economic Order, May 1, 1974 G.A. Res. 3021 (XXIX) (Special) U.N. GAOR Supp. (No. 1), U.N. Doc. A/9559 (1974) reprinted in 13 I.L.M. 715 (1974) [hereinafter NIEO Declaration]. See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc A/8028 (1971); Art. 1, Charter of Economic Rights and Duties of States G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 52, U.N. Doc. A/9631 (1975).

movement, the movement of information beyond borders. The core theme speaks to trade beyond borders, the appendage, TRIPS, to property spreading beyond borders. While the issues of movement, (trade and property) are not the same, there is at least enough resemblance to find common purpose.

In summary, the trade regime is a logical place to link the regulation of ubiquitous property not so much because the denial of intellectual property rights distorts trade, but because the trade regime is premised on the state in movement, as is an international intellectual property regime. A crucial element of linkage then is the principle of ubiquity which appears to inhabit the trade regime and its appendant intellectual property regime.

A vital criterion for future linkage then is ubiquity. While environmental, human, women's, labor, and other such rights might be seen as transcending national borders,⁹⁹ they lack the essence of ubiquity, the possibility of the same right existing everywhere at once, which is displayed by intellectual property. Admittedly, the common themes or perspectives that environmental or humane concerns generate world wide create an appearance of ubiquity, but this may be little more than a mask for a conglomeration of territorial-based concerns. If the trade regime were to universalize these substantive issues, its points of linkage would be shaped differently, perhaps in terms of common territorial themes. Alternatively, issues of the environment, gender, and human rights may be seen to transcend the territorial paradigm to become ubiquitous concepts and thereto be apt for appendage to the trade regime.¹⁰⁰ Interestingly, the implication of human rights in the legal

99. Karen Knopp, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993); Robert Malley et al., *Constructing the State Extra-territoriality: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273 (1990); TRANSNATIONAL ENVIRONMENTAL LAW (E. Urbani ed., 1994); Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala*, 9 AM. U.J. INT'L & POL'Y 117 (1994).

100. To some, the very notion of cooperation at a substantive international law level might suggest the issue in question is ubiquitous. See Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U.J. INT'L L. & POL'Y

structure of the European Community has not been for this reason. On the contrary, in that situation, human rights have been implied or appended to the trade regime to further the ends of economic integration and to make decisions of the European Court of Justice more palatable and legitimate for Member States with a strong rights tradition.¹⁰¹ On the other hand, the Community's social policy¹⁰² may indicate the beginning of a more ubiquitous notion of human rights,¹⁰³ as may its environmental principles suggest a more ubiquitous approach to environmental concerns.¹⁰⁴

3. The Value of the Subject Matter to First World Economies

The principle of ubiquity, while displaying a deeper notion of linkage, does not clearly explain more pragmatic reasons for the linkage of intellectual property and trade, which arise from the major role intellectual property now plays in economic growth, especially through international trade.¹⁰⁵

For example, computer software and much of the modern entertainment industry, informational endeavors of recent origin, being shipped offshore from the United States are heavily reliant on

751, 751-55 (1994).

101. JOSEPHINE SHAW, EUROPEAN COMMUNITY LAW 105-09 (1993).

102. COMMUNITY CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS (1989); *Protocol on Social Policy annexed to the TEEC*; Title VIII TEEC.

103. SHAW, *supra* note 101, at 329-34; STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 174-80 (1995). Note, though, the reluctance of the United Kingdom to support the social policy agenda, for political and ideological reasons. *See id.* at 175 *et seq.*

104. TEEC, Title XVI, Arts. 130r-130t. *See also* the North American Agreement on Environmental Cooperation, which is part of NAFTA.

105. Marshall A. Leafler, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273; Kenneth Abbott, *Protecting First World Assets in the Third World*, 22 VAND. J. TRANSNAT'L L. 689 (1989).

intellectual property rights to secure economic rewards.¹⁰⁶ Likewise, patents found massive global industries in pharmaceuticals and machinery that are important to economic growth.

The addition of more informational based exports has naturally lead to concern for protection of the wealth generated by these products and a pragmatic solution would be to suggest tying property rights to the trade regime. This may be little more than a manifestation of the principle of ubiquity.

In summary, the value of intellectual property, especially to the economic growth of the United States, has been a key factor in linkage.¹⁰⁷ This justification on its own does not adequately explain why the linkage has occurred, much in the same way as distortion of trade does not explain (from a constitutional systems perspective) why the intellectual property scheme is appended to the trade regime.

4. Both Conventions Require National Treatment

It might be argued that that linkage arises from the common theme of "national treatment." However, it would seem that the "national treatment" envisaged by GATT (that imported goods be as equally accessible to the market as local goods)¹⁰⁸ and the Great Conventions (that foreign intellectual property be protected to the same extent as local intellectual property)¹⁰⁹ are markedly different, reflecting their diverging purposes of creating clear channels of

106. Alford, *supra* note 80, at 98-99; Kurt Chang, *Special 301 and Taiwan: A Case Study of Protecting U.S. Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206, 211 (1995).

107. GADBAW & GWYNN, *supra* note 32, at 3-5.

108. GATT, Arts. III, XX. *See also* LPIER, *supra* note 32, at 504 *et seq.*

109. Berne, Art. 5; Paris Art. 2. *See also* Reichman, *supra* note 80, at 843-53; GOLDSTEIN, *supra* note 64, at 952 *et seq.*

exchange and an intellectual property regime.¹¹⁰ The strongest argument that can be put is that national treatment is used in both instances to benefit the foreign object or person.¹¹¹ Thus, this argument based on national treatment does not further clarify the issue of linkage.

B. *Effectiveness*

However, linkage on its own is only half the story. One must determine not only how linkage occurs, but also how one makes effective linkage; for it is only with effective linkage that a process of universalizing substantive international can be considered to be of any value. In turn, effectiveness may represent a further justification for linkage.

1. North (First/Developed/Industrialized World) - South (Third/Developing/Non-industrialized World) Economics

Threatening the effectiveness of the new TRIPS regime, which has various lead in times up to ten years,¹¹² are the basic cultural and economic differences of developed and developing

110. Compare Fikentscher, who suggests that GATT NT focuses on objects and the Great Conventions NT on people. See Fikentscher, *supra* note 28, at 122. See also G.E. Evans, *The Principle of National Treatment and the International Protection of Industrial Property* (1996) 3 EIPR 149, 156.

111. On the other hand, the application of a "national treatment" principle concerning aliens and their tangible property, through public international law, is quite limited. Here, the difference seems to be that NT is not *prima facie* beneficial to the alien. See BROWNLIE, *supra* note 95, at 523-8, 535-6.

112. TRIPS, Arts. 65-66. Developed countries must comply by January 1, 1996; developing countries and those in transition from a centrally planned to a market economy, by January 1, 2000; least developed countries, by January 1, 2006.

countries.¹¹³ The TRIPS agreement makes little accommodation for the plight of developing countries.¹¹⁴ Having developing countries locked into such an impressive regime may seem like a massive victory, but the question remains as to whether it will work.¹¹⁵

Prior to TRIPS, developing countries called for an international intellectual property regime that would meet their needs for welfare and development.¹¹⁶

113. A theoretical issue raised by intangibles like knowledge or expression is the spatial and social dimensions of ownership. When does one's right to own knowledge defer to social, cultural, or geographic considerations? See Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

114. Least developed countries are allowed a ten year transition period, to January 1, 2006. See TRIPS, Art. 66.

115. Sang-Hyun Song & Seong-Ki Kim, *Korea: The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 118 (1994); Suresh Kosy, *The Effect of TRIPS on Indian Patent Law: A Pharmaceutical Industry Perspective*, 1 B.U. J. SCI. & TECH. L. 4 (1995); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993); Anthony D. Sabatelli & J.C. Rasser, *Impediments to Global Patent Law Harmonization*, 22 N. KY. L. REV. 579 (1995); David Nimmer, *supra* note 56 at 135, 153-54; Chang, *supra* note 106; J. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. TRANSNAT'L L. 363 (1996); Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT'L L. 391 (1996); A. Samuel Oddi, *TRIPS - Natural Rights and a "Polite Form of Imperialism,"* 29 VAND. J. TRANSNAT'L L. 415 (1996); PUBLIC POLICY AND GLOBAL TECHNOLOGICAL INTEGRATION (Frederick M. Abbott & David J. Gerber eds., 1996); TECHNOLOGY AND THE WEALTH OF NATIONS (Dominique Foray & Christopher Freeman eds., 1993); Hugh C. Hansen, *International Copyright: An Unorthodox Analysis*, 29 VAND. J. TRANSNAT'L L. 579 (1996).

116. See Reichman, *supra* note 80; Braga, *supra* note 80; Emmert, *supra* note 61; Chimni, *supra* note 65; Derek Dessler, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 FORDHAM INT'L L.J. 181 (1995); Peter Gakunu, *Intellectual Property: Perspective of the Developing World*, 19 GA J. INT'L L. & COMP. L. 358 (1989); INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY chs. 9-10 (George R. Stewart et al., eds., 1994); David Hartridge & Arvind Subramanian, *Intellectual Property Rights Issues in GATT*, 22 VAND. J. TRANSNAT'L L. 893, 908-9 (1989); GADBAW &

These claims called for a flexible rather than rigid regime for intellectual property protection. TRIPS contains little flexibility in its application to developing countries. In short, TRIPS eschews any notion of "equity."¹¹⁷ Some commentators go further and suggest that the TRIPS agreement is inefficient and against the fundamental principle of trade liberalization.¹¹⁸ The apparent problem with imposing a rigid and inequitable regime upon the developing countries is that it will become unworkable and the high demands of TRIPS will simply not be met due to economic reality.¹¹⁹

More severe problems are likely to occur with patent than copyright issues, as TRIPS does little more than rehearse the basic provisions of the Berne Convention. Regarding patents, however, TRIPS radically heightens the protection formerly afforded by the Paris Convention and thereby creates a greater area for potential dispute. In some countries, for example India, a rigid patent regime has traditionally been seen as unfair consolidation of first world economic supremacy.¹²⁰

Additionally, the fact that there is no appendant antitrust regime also raises problems for competition and consequently,

GWYNN, *supra* note 34; ROBERT P. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS (1987); A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth*, DUKE L.J. 831 (1987); Marshall A. Leafler, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L.REV. 273; Kenneth Abbott, *Protecting First World Assets in the Third World*, 22 VAND. J. TRANSNAT'L L. 689 (1989); Clyde D. Stoltenberg, *US-Korea and US Taiwan Trade Law Issues in Comparative Perspective*, 11 MICH. J. INT'L L. 273 (1990); United Nations General Assembly Resolutions, *supra* note 98.

117. Fikentscher, *supra* note 28, at 146-159; *cf.* NIEO Declaration.

118. MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 252-4 (1995).

119. For example, consider the case of China. See Alford, *supra* note 80; WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENCE (1995); Dessler, *supra* note 116.

120. Kosy, *supra* note 115, at 36, 46 *et seq.*; Chimni, *supra* note 65.

positive opportunities for developing countries.¹²¹ These problem areas would seem to be quieted by the new dispute resolution mechanism set up under the WTO charter.¹²²

2. Enforceable Judicial Review

Under this new "judicial review" mechanism, Member States are bound¹²³ by decisions of the Dispute Settlement Body. If they default in carrying out those decisions, they can be subject to coercive retaliation measures across the field of international trade. This in large part legitimates the unilateral retaliatory measures pursued by the United States prior to TRIPS.¹²⁴ Arguably, these

121. See TRIPS, Arts. 8, 40, 67 noting the distinction between national and international approaches to antitrust: *Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1 para. 3. See also further Eleanor M. Fox, *Market Access, Antitrust, and the World Trading System: En route to TRAMS - Trade Related Antitrust Measures* (paper delivered Harvard Law School, Spring 1996); Fikentscher, *supra* note 28, at 123-24; J. Reichman, *Compliance with the TRIPS Agreement: Introduction to a Scholarly Debate*, 29 VAND. J. INT'L L. 363 (1996); ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? (John O. Haley & Hiroshi Iyori eds., 1995); Eleanor M. Fox, *Trade Competition and Intellectual Property - TRIPS and Its Antitrust Counterparts*, 29 VAND. J. TRANSNAT'L L. 481 (1996). For an example of how the anti-competitive exercise of intellectual property rights in the EC has been caught under TEEC Arts. 85, 86, see *Radio Telefis Eireann v. Magill TV Guide Ltd.*, [1990] E.C.C. 273; *Radio Telefis Eireann v. Commission of European Communities*, 1989 E.C.R. 1141, 4 CMLR 586 (1991), [1995] All ER 416; cf. *Volvo AB v. Erik Veng*, 1988 E.C.R. 6211 at paras. 8-9; CRAIG, *supra* note 87, at 1050-1062; BERMAN ET AL., *supra* note 87, at 828. (1993).

122. TRIPS is covered by the WTO Dispute Settlement Understanding.

123. Cf. the situation of states in the public international law regime where the primary dispute resolution body, the International Court of Justice, relies on the consent (sovereign autonomy) of states. See Statute of the International Court of Justice, Art. 36. "... it confirms that in this era of international (or sovereign) community, sovereign autonomy remains prominent in upholding the legitimacy of the ICJ as an international judicial institution." Fitzgerald, *supra* note 4, at 260.

124. On the relationship between TRIPS and section 301, see Judith H. Bello & Alan F. Holmer, *GATT Dispute Settlement Agreement: Internationalization Elimination of Section 301?*, 26 INT'L L. 795 (1992); J. Gero & K. Lannan,

unilateral measures had a moderate to positive effect on intellectual property protection,¹²⁵ and there is no reason to believe that the WTO will not be as effective.¹²⁶

However, the question remains as to whether a rigid or formal rule of law can substitute for trade diplomacy in areas where there are deep cultural and economic differences.¹²⁷ This ability to punish raises the effectiveness calculus and suggests the TRIPS scheme will be a success. A key to effectiveness then, will surely be this enforceable dispute mechanism, which in its strictest application will look more like a domestic constitutionalism than an international tribunal.¹²⁸

Reinforcing the new dispute resolution system is a detailed educational and monitoring program.¹²⁹ This type of arrangement, which builds on recent theories of compliance, will build structures that require states to justify their actions.¹³⁰ Standing ahead of this project is an enormous educational undertaking through which the massive populations of Asia (e.g., China and India) will be inculcated with a culture of copyright and patent protection. The effectiveness of educating these mostly developing countries in the

Trade and Innovation: Unilateralism v. Multilateralism, 21 CAN.-U.S. L.J. 81, 94 (1995).

125. Chang, *supra* note 106, at 210.

126. See DSU art 22. On the virtues of multilateralism, see John G. Ruggie, *Multilateralism: the Anatomy of an Institution*, 46 INT'L ORG. 561 (1992); GADBAW & GWYNN, *supra* note 32, at 28-29.

127. Cf. GATT art. XVIII, Part IV with LPIER, *supra* note 32, at ch. 24.

128. This raises the question of whether the trade constitutionalism suffers from a democracy deficit. See Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 633 (1994); Robert Hudec, *Circumventing Democracy: The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311 (1993).

129. See generally TRIPS, Art. 63, and note the role of the Council for TRIPS under Arts. 68 and 71.

130. Chayes & Chayes, *On Compliance*, *supra* note 55.

ethical and legal standards of the First World, which do not comport with the economic imperatives of the millions of poverty stricken people of Asia, appears crucial to the success of TRIPS. Without a successful education program, the sheer weight of numbers threatens to swamp the vision of TRIPS (and the attached dispute resolution system).

Overall, while the process seems nigh on hegemonic, it *promises* to be tremendously effective through its potential ability to extract information on, and justification for, non compliance, and to subsequently close off the pathway of trade. The next ten to twenty years will tell the story of the success or failure of TRIPS. While one must be skeptical about its absolute success, the mere fact that it exists, appended to the trade regime, seems to ensure that departure from the TRIPS mandate will only be undertaken with much trepidation. Ironically, the premise that makes the trade regime so universal, the need to trade to survive, is in many ways negated by a strict intellectual property regime like TRIPS. These inherent tensions suggest that after much effort is spent, the TRIPS agreement will have to be renegotiated to a point mid-way between North and South, the equator.¹³¹ Furthermore, the rapidity with which informational products are changed makes it unclear how much of TRIPS will be of any significance in ten to twenty years. This raises the further question of how much future intellectual property law (e.g., law covering the internet) will be incorporated into TRIPS, with what speed and ease. This may be a point where TRIPS is avoided through its obsolescence.¹³²

131. This is a suggestion that if the culture of intellectual property protection is to expand beyond industrialized (or perhaps liberal) states, then the points of reconciliation must be realistic. International norms that are achievable by only a selection of states will generate a segmented universality which will work against a widespread and faithful implementation of the norms, a consequence which will cripple the value of TRIPS.

132. J. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475 (1995); J. H. Reichman, *The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What are the Solutions?*, 17 HASTINGS COMM. & ENT. L.J. 767 (1995).

3. Trade Domination

Another serious issue with respect to effectiveness is the extent to which the trade-based nature of the regime will reshape the substantive content of intellectual property law.¹³³

The issue becomes important when trade principles, which normally underpin the very structure they inhabit, threaten to conflict with substantive principles attached to the trade regime.¹³⁴ In relation to the GATT, trade principles have trumped the environment, but that was not a clear case of appendage.¹³⁵ A more interesting example is the implication of human rights into the EC legal system by the European Court of Justice [hereinafter ECJ]. It has been persuasively argued that these implied rights have been suborned in favor of the fundamental trade principles of the European Community.¹³⁶ However, this example may be of little value if one perceives the implication of fundamental rights by the ECJ to be little more than a way of furthering the dictates of

133. Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 Cornell Int'l L.J. 607 (1994); Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ, and Trade-Environment Disputes*, 15 MICH. J. INT'L L. (1994). Some suggest (more generally) the move to an international society "will automatically transform political life . . . aligning it more closely with the needs of international commercial activity." Kennedy, *Receiving the International*, *supra* note 32, at 3.

134. Consider, for example, the environment and NAFTA. See *Symposium: NAFTA at Age One: A Blueprint for Hemispheric Integration*, 10 CONN. J. INT'L L. 221 (1995).

135. *United States - Restrictions on Imports of Tuna from Mexico* 39th Supp. BISD 155 (1993); LPIER, *supra* note 32, at ch.12; Abram Chayes & Lawrence Susskind, *THE POLICY DIALOGUE ON TRADE AND THE ENVIRONMENT* (1995); Possible Recommendations from the CTE to the Second WTO Ministerial Meeting (1995); Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U.J. INT'L L. & POL'Y 751 (1994).

136. See Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 COMMON MKT. L. REV. 669, 691-2 (1992) (claiming "the ECJ clearly subordinates human rights to the end of closer economic integration in the Community"); cf. Weiler & Lockhart, *supra* note 35.

economic integration. The example of the environment, as appended to NAFTA and the TEEC, may prove more interesting, but as of yet there is little indication of what might happen.¹³⁷

The problem with a universalizing process undertaken by trade based constitutionalism is that it runs the risk of privileging trade over the attached substantive principle or at the very least where the two conflict. In terms of intellectual property, this risk may not be so much of a problem because the points of conflict will be rare, since the more trade one does the more valuable the intellectual property regime becomes. This, then, may be a unique mixing, primarily due to the commercial nature of the TRIPS regime (moral rights are excluded from it), which perhaps indicates that the trade regime has already dominated the construction of this substantive law by limiting the content of law it will embrace.

4. Is Substantive Law Transferable?

Another interesting question which acts to illuminate linkage is the extent to which substantive laws can be applied in a universal and acontextual way. Comparative lawyers, for many years, argued as to the merits of transferring substantive laws between different cultures.¹³⁸

137. Paulette L. Stenzel, *Can NAFTA'S Environmental Provisions Promote Sustainable Development?*, 59 ALB. L. REV. 423 (1995); David S. Baron, *NAFTA and the Environment - Making the Side Agreement Work*, 12 ARIZ. J. INT'L L. & COMP. L. 543 (1995); Robert F. Housman and Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the NAFTA: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993); SIMON BRONITT ET AL., *PRINCIPLES OF EUROPEAN COMMUNITY LAW* ch.12 (1995); *Procureur De La Republique v. ADBHU*, 1985 E.C.R. 531 paras. 12-13: ". . . the principle of freedom of trade is not to be viewed in absolute terms but is subject to limits that are of general interest; *Commission of the European Communities v. Kingdom of Denmark (Beverage Containers Case)*, 1988 E.C.R. 4607 paras. 8-9.

138. See Spencer Weber Waller, *Neorealism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557 (1994); Hessel E. Yntema, *Comparative Research and Unification of Law*, 41 MICH. L. REV. 261. (1944); MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne Cohler et al. eds., & trans., 1989); Alan Watson, *Legal Transplants and Law Reform*, 92 LAW

While these lawyers found strong disagreement, the value of their argument is to suggest that not all cultures will necessarily support similar laws. This raises some doubt about the effectiveness of TRIPS, for if universalizing is diametrically opposed to cultural diversity, then this new regime may work poorly. My suggestion is that the principle of ubiquity has strengthened universalization in relation to ubiquitous properties (e.g., computer programs) and technologies (e.g., the internet) to a point where cultural difference, at least in the legal landscape, is all but eviscerated.

So the question of the transference of law scholars: "Does law have an ethnography?" disappears in the pervasiveness of ubiquitous property and technology. Domestic conditions are no longer the focus, rather it is the commercial property driving the law, which appears to transcend all cultural boundaries.

Overall, linkage has been generated by the realization that an ubiquitous type of property needs the more dynamic, trade, and movement based regime, to serve its purposes rather than the static and traditional public international regime. This linkage has been aided by the fact that ubiquitous property is a valuable commodity of international trade. However, the value of property in international trade cannot be a primary reason for linkage, for if it were, one would expect a general code of property rights attached to GATT. An important supplement is the effectiveness of the trade regime in generating compliance, which in itself appears to rise out

Q. REV. 79 (1976); Bernhard Grossfeld, *Geography and the Law*, 82 MICH. L. REV. 1510 (1984); FRIEDRICH C. VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (A. Hayward trans., 1931); FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 111-135 (2d ed. 1898); HENRY S. MAINE, ANCIENT LAW (1861); OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881); Eric Stein, *Uses, Misuses and Non Uses of Comparative Law*, 72 NW. U. L. REV. 198 (1977); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); ROBERT SEIDMAN, THE STATE, LAW AND DEVELOPMENT (1978); JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); Spencer Weber Waller, *Cultural Conceptions of Competition: Antitrust and American Business Abroad*, 44 DEPAUL L. REV. 1251 (1995); Andrew I. Gavil, *Competition and Cooperation on Sherman Island: An Antitrust Ethnography*, 44 DEPAUL L. REV. 1251 (1995).

of the dynamic or moving character of the trade regime. The trade regime is effective because, as it acts as a pathway, it has the ability (held by the international community) to coerce through closing off the pathway. The traditional public international law regime being rooted in territorial sovereignty and integrity lacks an ability to coerce. In point form:

- (1) Intellectual property, a ubiquitous property, is linked to trade because the trade regime has an ability to conceptualize the movement (ubiquity) of states;
- (2) The trade regime is effective in implementing intellectual property rights, because it is premised on the notion of movement of states, and this movement is subject to the consent of the international community.

VI. A THEORY OF UNIVERSALITY: SOME CONCLUSIONS

Having assessed the process through which intellectual property has been appended to the trade regime, it is appropriate to draw this article to a close with some thoughts on the construction of universal substantive norms in the post cold war international legal system; a theory as to how nations of all descriptions will act to construct universal substantive norms. TRIPS is an indication that while First World "bullying" will produce a problematical regime,¹³⁹ the seeds of a theory of universality have been sown.

This is a universality that (desirably) will entail construction in the truest sense. It will not be a given of the First World, rather a negotiated mid-point where the trade interests of all provide the

139. ALFORD, *supra* note 119; Alford, *supra* note 80 at 107. "[i]f GATT is not to replicate errors of the past, particularly with respect to issues of development . . . it must devise rules that speak honestly to and with compassion for the needs of all concerned." ALFORD, *supra* note 80 at 107.

moderating equation.¹⁴⁰ However, this is a universality that will not be built issue by issue, but as a package upon the back of the trade regime. This will have the inevitable consequences of trade being privileged over substance except where the two are compatible.

This type of universality will operate effectively only in the situation where the trade and substantive principle are both heading in the same direction (meaning more trade prospers the substantive principle), where the substance is negotiated, and only upon the back of the trade principle. Issues that do not fit these requirements will either endure a compromised trade influenced universal norm, or revert back to the single issue fora of public international law. Distinguishing which process will be capable of doing what, is a question for the points of linkage, and the effectiveness of linkage. Making clear the points of linkage and the conditions of effectiveness will go a long way towards explaining how law amongst "all" nations is universalized.

The process for universalizing substantive international law through linkage will work best where the issues of concern display some sense of ubiquity. It will be these issues that strike up a logical appendage to the trade regime. However, the problem is that as the world comes closer together through technology (more integrative), all concerns may display some sense of ubiquity, suggesting the trade regime will replace the public international regime in the area of substantive international law. This is a worry because many may perceive¹⁴¹ trade domination as turning the universalizing process away from equity or justice, towards economic criteria like efficiency. However, while the process of linkage will be guided by ubiquity, its ultimate success will depend

140. Reichman, *supra* note 80, at 814, commented prior to TRIPS on the differing attitudes towards intellectual property:

Between the two extremes lies a gray area in which the legitimate economic policies pursued by different states overlap and conflict. The resulting tensions can be lessened through good faith negotiation and cooperation between states, in a manner that takes into account the interests of the developed countries without prejudicing the interests of developing countries.

141. Receiving the International, *supra* note 32, at 2-3, 10-15, 24-26.

on its equity and negotiability. The packaging, ubiquity, and effectiveness of the trade regime will make it a powerful force in universalizing substantive international law, perhaps less kind, but ultimately it must please all. The next ten to twenty years will explain in the context of TRIPS just how important ubiquity and equity are to universalizing substantive international law. One should imagine both are of great importance.

When agreement on substantive issues is found and locked in with the trade regime, it will be much more effective or universalized through judicial enforcement than in traditional public international law, especially as it is attached to a regime that has popular support; this will be the strongest substantive international law that we have ever known. It is time for public international law to take notice and learn. This may, in the long term, force public international law to invoke the notion of multi issue or fora treaty making (omnibus treaties), to seek out its universal principles inherent in the realm of process (coexistence) and to employ compulsory jurisdiction.

This analysis highlights the institutional incapacity and failure of the traditional public international law regime to provide an effective mechanism for constructing and then enforcing substantive international law. In contrast, this article has been designed to show how the trade regime acts as a powerful constitutional system, due to its underlying focus on the state in movement. This notion that the trade regime talks to pathways of commerce explains why problems with ubiquitous property are logically allied with this regime. It has the ability to understand their ubiquitous nature much better than public international law, and an ability, though not absolute, to secure compliance. For in the international trade regime, the starting premise is a universal, controlled by sovereign community, whereas in the public international regime, the starting point is sovereign difference, controlled by sovereign autonomy. In the trade regime, the ubiquitous notion of trade is needed by all and at least in theory owned by all.

In summary, one perceives a powerful law making process in the trade regime that promises to dominate the construction of substantive international law in the near future.

VII. CONCLUSION: MAPPING THE CONSTITUTIONAL SYSTEMS
THAT GENERATE (CONSTRUCT AND UNIVERSALIZE)
INTERNATIONAL LAW

The essential value of this article is that it offers to conceptualize, and to create a framework through which to understand, the changing nature of international legal obligations. This is a project about constitutionalism, about systems, about frameworks, and in the end understanding a rapidly changing international legal landscape. Without research like this, the "internationals" remain fragmented and disjointed, which denies critical evaluation of any effectiveness.

The primary aim of this article is to provoke people who read it to ask: "Why has intellectual property law been appended to GATT?" and have them give justifications more profound than: "Linkage occurs because intellectual property is important to the United States due to its prominence in international trade." Such an answer does not adequately explain why it is the trade regime that is used as the vehicle for universalizing international intellectual property law and not the public international law regime. I wish to draw out debate on linkage and its effectiveness. My own view, expounded above, is that the trade regime is fluid and moving and in this sense makes a natural and effective vehicle for constructing and universalizing substantive laws relating to ubiquitous issues.